

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JMP SECURITIES LLP,)	Case No. 11-4498 SC
)	
Plaintiff,)	ORDER GRANTING DEFENDANT'S
)	SECOND MOTION FOR JUDGMENT
v.)	<u>ON THE PLEADINGS</u>
)	
ALTAIR NANOTECHNOLOGIES INC.,)	
)	
Defendant.)	
)	
)	

I. INTRODUCTION

Now before the Court is the Second Motion for Judgment on the Pleadings brought by Defendant Altair Nanotechnologies Inc. ("Altair") against Plaintiff JMP Securities LLP ("JMP"). ECF Nos. 37 ("2d MJP"), 42 ("2d Opp'n"), 45 ("2d Reply"). The parties' moving papers supply a choice-of-law analysis that they omitted when briefing Altair's First Motion for Judgment on the Pleadings. ECF Nos. 21 ("1st MJP"), 23 ("1st Opp'n"), 26 ("1st Reply"). The instant motion is suitable for determination without oral argument. Civ. L.R. 7-1(b). As set forth below, the Court GRANTS the motion.

II. BACKGROUND

This Order assumes familiarity with the Court's March 14, 2012 denial of Altair's First Motion for Judgment on the Pleadings. ECF

1 No. 30 ("1st Order").¹ To summarize, Altair, a technology company,
2 anticipated entering into a substantial financial transaction,
3 though the timing and nature of the transaction were uncertain. On
4 July 8, 2010, Altair hired JMP to serve as its financial advisor
5 for the transaction. The parties formalized their relationship in
6 a written Agreement. ECF No. 1 ("Compl.") Ex. A ("Agr."). The
7 Agreement provided JMP with a retainer fee. It also provided JMP
8 with a contingent fee, payable after a completed transaction. The
9 size of this fee would be determined by (1) the type of transaction
10 that Altair consummated and (2) with whom. JMP would receive a
11 certain percentage fee if Altair was sold to or merged with another
12 company (the "sale/merger" fee)² and another, higher percentage fee
13 if Altair secured a "strategic investment." In both cases, JMP's
14 fee would be discounted if Altair's partner in the transaction was
15 Yintong Energy Company Limited ("Yintong") or one of its corporate
16 affiliates. 1st Order at 3-4 (citing and summarizing provisions).

17 In addition to its fee-setting provisions, the Agreement
18 included two more clauses that are relevant to this motion. First,
19 the Agreement contains a choice-of-law clause stating that it
20 "shall be governed by and construed in accordance with the internal
21 laws of the State of New York without giving effect to any
22 principles of conflicts of law." Agr. at 5. Second, the Agreement
23 incorporates an attached Indemnification Agreement indemnifying JMP

24
25 ¹ JMP Sec. LLP v. Altair Nanotechnologies Inc., 11-4498 SC, 2012 WL
892157, 2012 U.S. Dist. LEXIS 34549 (N.D. Cal. Mar. 14, 2012).

26 ² In actuality, two fee provisions apply in the sale/merger
27 context: a flat fee in case of complete sale or merger and a
28 "gross-up provision" in case of partial sale or merger. Agr. at 2,
3. Because the distinction is irrelevant here, the Court treats
the sale/merger scenario as providing a single fee.

1 against claims "relating to or arising out of" the Agreement. Agr.
2 Ex. A ("Indem. Agr.") at A-1.

3 In July 2011, Altair and Yintong completed a transaction
4 which, all parties concede, was covered by the Agreement. Roughly
5 \$57.5 million changed hands. Compl. ¶ 30. Nevertheless, Altair
6 allegedly has not yet made good on its promise to pay JMP the
7 contingent fee. Id. ¶ 31. The parties cannot agree on what type
8 of transaction Altair completed and, therefore, on the size of
9 JMP's fee.

10 In September 2011, JMP sued Altair for (1) breach of contract,
11 (2) promissory estoppel, (3) fraud, and (4) negligent
12 misrepresentation. Compl. ¶¶ 39-64. JMP's breach of contract
13 claim is actually two claims in one. The first concerns the size
14 of the fee owed to JMP under the Agreement (the "fee claim"); JMP
15 pled this claim using three alternative theories of breach, each
16 related to a different fee-setting provision in the Agreement. Id.
17 ¶¶ 41-43. The second concerns JMP's alleged contractual right to
18 reimbursement from Altair for JMP's attorney fees in this lawsuit
19 (the "attorney fee claim"). Id. ¶ 44.

20 In November 2011, Altair brought a motion for judgment on the
21 pleadings which challenged JMP's attorney fee, promissory estoppel,
22 fraud, and negligent misrepresentation claims, as well as two of
23 the three theories underpinning the fee claim.³ JMP opposed the
24 motion. Notably, although the parties' papers described the case
25 as a straightforward matter of contract interpretation, they also

26
27 ³ The Court left all three theories undisturbed, 1st Order at 21,
28 and Altair (properly) has not renewed its challenge to the fee
claim in this motion. Accordingly, the fee claim may proceed as
pled in the Complaint.

1 hinted that it might be something more. First, both parties used
2 New York law to brief the breach of contract claims (that is, the
3 fee and attorney fee claims) but California law to brief the other
4 claims, despite the clause in the Agreement selecting New York law.
5 Second, the briefs contained a series of footnotes in which the
6 parties gestured toward conflict-of-law issues without ever really
7 joining them. To summarize, the parties assured the Court that the
8 case presented no conflicts of law -- but that, if it did, the
9 conflict would favor their side. 1st MJP at 16 n.4; 1st Opp'n at
10 14 n.7, 15 n.8, 21 n.14; 1st Reply at 8 n.3, 9 n.4. These apparent
11 assurances had the opposite of their intended effect and spurred
12 the Court to undertake sua sponte the choice-of-law analysis that
13 the parties seemed pointedly to be avoiding. 1st Order at 8-15.

14 With one exception, the Court determined that JMP's claims
15 were governed by the substantive law of New York. Id. at 15.
16 Because the parties had briefed the fee claim using New York law,
17 the Court applied that body of law, ultimately denying Altair's
18 motion with respect to that claim. Id. at 15-20. With respect to
19 the promissory estoppel, fraud, and negligent misrepresentation
20 claims, the Court determined that, by briefing California rather
21 than New York law, the parties had failed to place the correct
22 rules of decision before the Court. Id. at 15. Because Altair was
23 the moving party and therefore bore the burden of persuasion, the
24 Court denied Altair's motion with respect to those claims. Id.
25 Finally, with respect to the attorney fee claim, the Court
26 determined that the parties had not adequately briefed the issue of
27 which law applied. Id. at 12-14. The Court therefore denied
28 Altair's motion with respect to that claim. Id. at 14.

1 Now Altair has filed a Second Motion for Judgment on the
2 Pleadings. The instant motion explicitly articulates the steps of
3 the choice-of-law analysis that the last motion omitted, then
4 refers the Court to the first round of briefing for the merits.
5 With the choice-of-law analysis now fully briefed, the Court can
6 determine whether Altair is entitled to judgment on the pleadings.

7
8 **III. DISCUSSION**

9 **A. JMP's Procedural Challenge**

10 As a preliminary matter, JMP challenges Altair's right to
11 bring the instant motion, saying it is merely a motion for
12 reconsideration filed under a different name. 2d Opp'n at 3-5. In
13 this district, motions to reconsider an interlocutory order in a
14 civil case: may only be filed after seeking and receiving the leave
15 of the Court; may not duplicate arguments made the first time
16 around; and must be based on a showing that either (1) the parties
17 excusably erred as to the material facts or controlling law,
18 despite reasonable diligence, (2) the law or facts have materially
19 changed since the order issued, or (3) the court manifestly failed
20 to consider a material fact or dispositive argument presented to
21 it. Civ. L.R. 7-9. JMP argues that, under this standard, the
22 instant motion is both substantively and procedurally improper:
23 substantively improper because Altair offers new arguments that it
24 could have but did not make, and procedurally improper because
25 Altair did not seek leave to file it. JMP urges the Court to deny
26 Altair's motion in summary fashion in the interests of judicial
27 economy and finality. 2d Opp'n at 5.

28 The Court concludes, however, that the values of economy and

1 finality are better served by considering Altair's motion than by
2 summarily rejecting it. First, if the Court were to do as JMP asks
3 and read the instant motion as one for reconsideration, the Court
4 would be inclined to grant it. The Court takes Altair's position
5 to be that the Court erred in concluding that New York substantive
6 law applied to all of JMP's claims, though Altair, understandably
7 but unnecessarily, seems reluctant to say this in so many words.
8 See, e.g., 2d Reply at 6. The Court reached its conclusion after
9 conducting a choice-of-law analysis omitted by the parties. These
10 parties are not, of course, the first people ever to dodge choice-
11 of-law issues, which can be difficult, even arcane. See, e.g., ABF
12 Capital Corp. v. Grove Properties Co., 126 Cal. App. 4th 204, 214-
13 15 (Cal. Ct. App. 2005) (criticizing courts who have "simply passed
14 over" required choice-of-law analysis). For the reasons detailed
15 in the next section, the Court is persuaded that its earlier
16 choice-of-law analysis is worth revisiting.

17 Given that reality, as well as the failure of both parties
18 (not just Altair) to articulate the choice-of-law issues raised in
19 this case, the Court is inclined to take the instant motion on its
20 own terms. The issues briefed here were not adequately considered
21 by either party's initial papers, and the Court does not discern
22 any improper purpose behind Altair's filing of the instant motion.
23 On the contrary, the motion serves the useful purpose of narrowing
24 the issues for trial or possible settlement, and Altair has been
25 careful only to supplement its previous briefing in conformity with
26 guidance provided by the Court.

27 Summary denial at this point would only result in wasteful and
28 empty formality, since denying the motion likely would prod Altair

to file a motion for reconsideration, which the Court would be inclined to grant. The Court's local rules are meant to streamline the administration of justice, not complicate it. Moreover, those rules do nothing to limit the Court's "inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper, 254 F.3d 882, 889 (9th Cir. 2001) (citing Melancon v. Texaco, Inc., 659 F.2d 551, 553 (5th Cir. 1981); Fed. R. Civ. P. 54(b)). In the extremely unusual circumstances of this case, punctilious enforcement of the local rule's technical requirements would do more harm than good; accordingly, the Court declines to dismiss the instant motion in summary fashion and instead proceeds to its substance.⁴

B. Choice of Law

As the Court recognized in its earlier Order, when confronted with a choice-of-law question, a federal district court sitting in diversity must use the choice-of-law rules of its forum state to determine which state's substantive law to apply. 1st Order at 9-10 (citing Fields v. Legacy Health Sys., 413 F.3d 943, 950 (9th Cir. 2005)). This Court therefore applies California's choice-of-law rules. When a contract contains a choice-of-law provision, courts applying California's choice-of-law rules follow Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459 (Cal. 1992). This Court followed the Nedlloyd analysis in the First Order. When the Court reached the question of which claims fell within the scope of the Agreement's choice-of-law clause, the Court cited Nedlloyd for

⁴ Nothing in this Order should be construed to create any sort of exception to or expansion of Civil Local Rule 7-9.

the proposition that it encompassed all claims "arising from or related to" the Agreement, regardless of whether they were characterized as contract or tort claims and including "tortious breaches of duties emanating from the agreement." 1st Order at 14 (quoting Nedlloyd, 3 Cal. 4th at 470).⁵ Applying this rule, the Court held that all four of JMP's claims were governed by the Agreement's choice-of-law clause and therefore would be decided under the substantive law of New York state. Id. at 15.

In its second motion, Altair points out that, under California's choice-of-law rules, the scope of the claims covered by a choice-of-law agreement "is a matter that ordinarily should be determined under the law designated therein." Washington Mut. Bank, FA v. Superior Court, 24 Cal. 4th 906, 916 n.3 (2001) (citing Nedlloyd, 3 Cal. 4th at 469 n.7). In Nedlloyd, the California Supreme Court interpreted the scope of a contract's choice-of-law clause. The clause selected Hong Kong law, but the parties had neither briefed nor requested judicial notice of that jurisdiction's laws. The Nedlloyd court held that the question of the scope of the choice-of-law clause should be determined by Hong Kong law, but, given that it did not have Hong Kong law before it, the court used California law instead. Nedlloyd, 3 Cal. 4th at 469 n.7; see also Restatement (Second) of Conflict of Laws § 136 cmt. h (1971). In short, the Nedlloyd court applied California law only

⁵ As set forth more fully in Section III.C.4 *infra*, JMP's fraud and negligent misrepresentation claims are based on Altair's alleged promise and subsequent refusal to pay JMP a certain fee; the promises were, according to JMP, either frauds or negligent misrepresentations. See Compl. ¶¶ 51-64. Thus, JMP's fraud and negligent misrepresentation claims rest on Altair's alleged tortious breaches of Altair's contractual duty to pay JMP the promised fee.

1 because it did not have the correct body of law before it.

2 Altair argues that Nedlloyd therefore counsels this Court to
3 use New York law to determine the scope of the Agreement's choice-
4 of-law clause, because, unlike in Nedlloyd, the parties have placed
5 the applicable New York law before the Court. 2d MJP at 8. JMP
6 does not dispute this point, and the Court agrees with it. The
7 scope of a contract's choice-of-law clause is determined by the
8 body of law identified in the agreement, unless the agreement
9 specifies a different scope. Washington Mut., 24 Cal. 4th at 916
10 n.3; see also Batchelder v. Kawamoto, 147 F.3d 915, 918 n.2 (9th
11 Cir. 1998). Accordingly, because the Agreement at issue in this
12 case identifies New York law and does not specify otherwise, the
13 Court applies New York law to determine which of JMP's claims the
14 Agreement covers.

15 New York differs from California in its approach to
16 determining the scope of a choice-of-law clause. Under the
17 California approach, all claims "arising from or related to" a
18 contract are covered by the contract's choice-of-law clause,
19 regardless of whether they are characterized as contract or tort
20 claims. Nedlloyd, 3 Cal. 4th at 470. But the New York approach
21 distinguishes between these types of claims: "Under New York law,
22 choice-of-law clauses are deemed to apply only to claims that are
23 based on rights conferred by the agreement." Sarandi v. Breu, C
24 08-2118 SBA, 2009 WL 2871049, at *4 (N.D. Cal. Sept. 2, 2009)
25 (citing Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.,
26 414 F.3d 325, 335 ("Fin. One") (2d Cir. 2005)). This means that
27 claims arising from tortious breaches of contractual duties are,
28 under New York law, not covered by the contract's choice-of-law

1 clause. See Fin. One, 414 F.3d at 335. Even claims based on the
2 contract law doctrine of promissory estoppel are regarded as extra-
3 contractual (because promissory estoppel applies only in the
4 absence of an enforceable contract) and therefore fall outside the
5 scope of a contract's choice-of-law provision. Nat'l Oil Well
6 Maint. Co. v. Fortune Oil & Gas, Inc., 02 CV. 7666 (LBS), 2005 WL
7 1123735, at *4 (S.D.N.Y. May 11, 2005) (applying New York law).
8 Under these rules, it is clear that only those claims based on
9 Altair's alleged breaches of rights conferred by the Agreement fall
10 within the scope of the Agreement's choice-of-law clause.
11 Accordingly, the Court holds that JMP's fee claim and (because JMP
12 alleges that it is based on rights conferred by the Agreement)
13 attorney fee claim fall within the scope of the Agreement's clause
14 selecting New York law. JMP's extra-contractual promissory
15 estoppel, fraud, and negligent misrepresentation claims do not.

16 This holding raises two subordinate questions. First, does
17 any conflict of law prevent the Court from applying New York law to
18 the fee and attorney fee claims? Second, if New York law does not
19 apply to the extra-contractual claims, which state's law does?

20 The Court answers the first question in the negative: No
21 conflict with California law prevents the Court from applying New
22 York law to the fee claim and attorney fee claim. Previously, the
23 Court determined that the parties had raised the possibility of
24 such a conflict and that Altair had not completed the analysis that
25 would allow the Court to determine whether the possibility was a
26 reality. 1st Order at 12-13. Altair has since done so. 2d MJP at
27 4-5. In brief, California and New York conflict in their treatment
28 of unilateral attorney fee provisions: California has a fundamental

1 policy against unilateral attorney fee provisions, while New York
2 allows them. Hence, California's fundamental policy regarding
3 unilateral attorney fee provisions is in conflict with New York
4 law. See ABF Capital, 126 Cal. App. 4th at 223. If the Court
5 found such a provision here, being bound by California's choice-of-
6 law rules (see Fields, 413 F.3d at 950), the Court would be
7 required to enforce California's fundamental policy against such
8 clauses. However, the Court concludes that the plain language of
9 the Agreement contemplates only indemnification from the costs of
10 third-party suits and does not give rise to a unilateral right to
11 attorney fees in "intra-party" litigation. Because the Court
12 determines that the Agreement does not provide either party with a
13 unilateral right to attorney fees, the Court agrees with the
14 parties that the merits of JMP's attorney fee claim should be
15 determined under New York law.⁶

16 Turning to the second question -- which state's laws apply to
17 the extra-contractual claims if not New York's law -- the Court
18 determines that California law applies. In the absence of an
19 effective choice-of-law agreement, California choice-of-law rules
20 permit a court to apply the decisional rules of its forum state
21 "unless a party litigant timely invokes the law of a foreign
22 state." Washington Mut., 24 Cal. 4th at 919 (internal quotation
23 marks omitted). Here, JMP has not timely invoked foreign law with
24 respect to the extra-contractual claims. During the first round of
25

26 ⁶ Both parties seek application of New York law to the attorney fee
27 claim. 2d Opp'n at 8 ("Altair does not dispute that the Agreement
28 is governed by New York law"), 2d Reply at 2 ("JMP does not
dispute that applying New York law regarding whether an indemnity
provision permits the recovery of attorneys' fees presents no
conflict with a fundamental policy of California.").

1 briefing, JMP joined Altair in briefing these claims using
2 California law, and JMP has done the same in briefing this motion.
3 See 1st Opp'n at 14-16; 2d Opp'n at 6-7. Therefore, the Court
4 deems JMP to have acquiesced in the application of California law
5 to the extra-contractual claims. See Hatfield v. Halifax PLC, 564
6 F.3d 1177, 1184 (9th Cir. 2009).

7 Having ascertained that New York law applies to JMP's
8 contract-based claims (i.e., its attorney fee claim, as well as the
9 fee claim that already has survived a challenge from Altair) and
10 that California law applies to the extra-contractual claims, the
11 Court now proceeds to the merits of Altair's Second Motion for
12 Judgment on the Pleadings.

13 **C. Motion for Judgment on the Pleadings**

14 **1. Legal Standard**

15 "After the pleadings are closed -- but early enough not to
16 delay trial -- a party may move for judgment on the pleadings."
17 Fed. R. Civ. P. 12(c). "Judgment on the pleadings is proper when
18 the moving party clearly establishes on the face of the pleadings
19 that no material issue of fact remains to be resolved and that it
20 is entitled to judgment as a matter of law." Hal Roach Studios,
21 Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir.
22 1989). Moreover, a motion for judgment on the pleadings is subject
23 to the same standard of review as a motion to dismiss, and thus the
24 pleading must contain sufficient factual matter, accepted as true,
25 to state a claim to relief that is plausible on its face. Johnson
26 v. Rowley, 569 F.3d 40, 44 (2d Cir. 2009); see also Cafasso, U.S.
27 ex rel. v. General Dynamics C4 Systems, Inc., 637 F.3d 1047, 1055
28 n.4 (9th Cir. 2011) (citing Johnson). A claim is plausible on its

1 face when the plaintiff pleads "factual content that allows the
2 court to draw the reasonable inference that the defendant is liable
3 for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937,
4 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556
5 (2007)).

6 2. Attorney Fees

7 JMP bases its breach of contract claim for attorney fees on
8 the four corners of the Agreement, including the incorporated
9 Indemnification Agreement, both of which JMP attached to the
10 Complaint. JMP's attorney fee claim is therefore amenable to
11 judgment on the pleadings because it only requires the Court to
12 interpret the effect of the contract's undisputed terms. See Hal
13 Roach Studios, 896 F.2d at 1550; see also Wright & Miller, 5C Fed.
14 Prac. & Proc. Civ. § 1367 (3d ed.). The only question is whether
15 the Agreement or Indemnification Agreement provides JMP with a
16 right to have Altair pay JMP's attorney fees arising from the
17 instant, intra-party litigation (as compared to a lawsuit filed by
18 a third party). The Court concludes that neither does.

19 The Court reaches this conclusion in reliance on Hooper
20 Associates, Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487 (1989). In
21 that case, the high court of the state of New York noted that under
22 New York law the general rule is that "attorney's fees are
23 incidents of litigation" and that parties therefore bear their own
24 attorney fees unless there is a legal reason to do otherwise.
25 Hooper, 74 N.Y.2d at 491. Beginning from this premise, the court
26 observed that

27 [w]hen a party is under no legal duty to indemnify, a
28 contract assuming that obligation must be strictly
construed to avoid reading into it a duty which the

1 parties did not intend to be assumed. The promise should
2 not be found unless it can be clearly implied from the
3 language and purpose of the entire agreement and the
4 surrounding facts and circumstances. Inasmuch as a
5 promise by one party to a contract to indemnify the other
6 for attorney's fees incurred in litigation between them
7 is contrary to the well-understood rule that parties are
8 responsible for their own attorney's fees, the court
9 should not infer a party's intention to waive the benefit
10 of the rule unless the intention to do so is unmistakably
11 clear from the language of the promise.

12 Hooper, 74 N.Y.2d at 491-92 (citations omitted).

13 In this case, nothing in the language of the Agreement or the
14 incorporated Indemnity Agreement, or in the facts and circumstances
15 surrounding the execution of the Agreement, "unmistakably" shows
16 that the parties intended to give JMP a contractual right to
17 recover attorney fees from Altair if the fees arose from litigation
18 between them. In other words, there is no reliable evidence that
19 JMP and Altair intended the Indemnification Agreement to cover
20 claims between themselves. The Indemnity Agreement contains merely
21 "general language indemnifying any breach," which "is not specific
22 enough to allow the court to infer that the parties intended the
23 indemnification of counsel fees in an action on the contract."
24 Foster Poultry Farms Inc. v. Suntrust Bank, 355 F. Supp. 2d 1145,
25 1152 (E.D. Cal. 2004) (applying New York law) (internal quotation
26 marks and citations omitted).

27 JMP argues that, read as a whole, the Indemnification
28 Agreement clearly gives JMP a right to intra-party indemnification
because it contains not only general indemnification language but
also provisions that specifically target third-party claims.
According to JMP, the Court can only give effect to all the
language of the contract by reading the general language to cover
claims between the contracting parties while the more specific

1 language covers third-party claims. 1st Opp'n at 13. This
2 argument rests on a faulty premise: While it is true that the
3 Indemnification Agreement clearly contemplates third-party claims,
4 that is not enough. There must be some further indication that the
5 parties specifically contemplated intra-party claims and
6 affirmatively determined to indemnify a party for attorney fees
7 arising from such claims. Hooper, 74 N.Y.2d at 492; Foster
8 Poultry, 355 F. Supp. 2d at 1152. The mere presence of specific
9 language amidst general language does not overcome the presumption
10 against intra-party indemnification, by implication as it were.
11 "Language providing indemnification for action on the contract must
12 be expressly present." Foster Poultry, 355 F. Supp. 2d at 1152.
13 Reading the Indemnification Agreement in its entirety and examining
14 the circumstances surrounding the drafting of the Agreement, the
15 Court finds nothing that rises to the required level of
16 specificity. The Court therefore concludes that the
17 Indemnification Agreement covers only third-party claims.

18 JMP cites to a line of New York cases where courts read
19 contracts in the manner urged by JMP here, but the cases are
20 distinguishable. In each one, the court encountered particular
21 facts or contract language that unmistakably demonstrated that the
22 parties had distinguished between third-party and intra-party
23 actions and affirmatively opted to provide a right of indemnity in
24 the latter case. See Mid-Hudson Catskill Rural Migrant Ministry,
25 Inc. v. Fine Host Corp., 418 F.3d 168, 177-79 (2d Cir. 2005)
26 (drafting history showed intent to provide intra-party
27 indemnification); Pfizer, Inc. v. Stryker Corp., 348 F. Supp. 2d
28 131, 145-46 (S.D.N.Y. 2004) (indemnification for breach of warranty

of representation did same); Promuto v. Waste Mgmt., Inc., 44 F. Supp. 2d 628, 650-52 (S.D.N.Y. 1999) (explicit cap on damages in action between the parties did same).⁷ JMP identifies nothing within or outside the four corners of the Agreement that reliably indicates a similar intent here.

On the contrary, as Altair points out, the Indemnification Agreement's inclusion of both notice-of-claim and assumption-of-defense clauses evinces an intent to cover only third-party claims. 1st MJP at 15. To apply these provisions to litigation between the parties would be absurd: JMP would be required to provide Altair with notice that JMP had sued Altair, and Altair would be presumptively entitled to select JMP's counsel and control JMP's litigation of the case. By including these provisions, the parties signaled that they did not intend the indemnification agreement to apply to intra-party lawsuits.⁸ See Goshawk Dedicated Ltd. v. Bank

⁷ JMP also cites to Sagittarius Broad. Corp. v. Evergreen Media Corp., 243 A.D.2d 325 (N.Y. App. Div. 1997). In that case, a New York state appellate panel distinguished Hooper and found a right to intra-party indemnification. However, the panel's terse, three-paragraph opinion does not reproduce the contract language upon which it relied. Nor does the panel's one-sentence analysis of the contract provide reliable clues. See id. at 326 ("Here, the first sentence of the subject clause cannot reasonably be interpreted as limited to third-party claims, particularly in view of the second portion of that clause, which clearly pertains to third-party actions, thereby rendering the first part mere surplusage were it only applicable, as defendant maintains, to third-party actions."). The Court can give Sagittarius no weight because the Court cannot discern whether the contract at issue there resembles the one here.

⁸ JMP points to these very provisions to support its position, saying that they "explicitly apply only to actions 'brought against any Indemnified Person'" and therefore support a reading that the Indemnification Agreement contemplates both third-party and intra-party lawsuits. 1st Opp'n at 13 (quoting Indem. Agr. at A-1) (emphasis in original). Assuming arguendo that this language is as explicit as JMP says it is, the Indemnification Agreement defines "Indemnified Person" as, in short, JMP. Indem. Agr. at A-1. JMP is the plaintiff in this lawsuit, hence the instant action is not one "against" JMP. JMP's argument fails on its own terms, then,

1 of New York, 06 CIV. 13758 (MHD), 2010 WL 1029547, at *6 (S.D.N.Y.
2 Mar. 15, 2010). This conclusion is further supported by the
3 Indemnification Agreement's having explicitly contemplated the
4 possibility of third-party actions in the form of private
5 securities litigation. Id. at *7; Indem. Agr. at A-1.

6 Lastly, JMP argues that even if the Indemnification Agreement
7 does not provide an attorney fee provision, the Agreement itself
8 does. 1st Opp'n at 14. The sentence on which JMP relies provides,
9 in full: "Whether or not there is a closing of the Transaction, you
10 [Altair] will reimburse us [JMP] periodically upon our request for
11 our reasonable expenses incurred in connection with the
12 Transaction, including, without limitation, the reasonable fees and
13 expenses of legal counsel and travel expenses." Agr. at 3. This
14 is mere boilerplate, and it falls short of the sort of
15 unmistakable, clear, explicit language required by Hooper. "A
16 clause indemnifying the party for 'reasonable counsel fees' that is
17 not exclusively or unequivocally referable to claims between the
18 parties themselves, is insufficiently clear to overcome the general
19 rule" that attorney fees are incidents of litigation. Broadhurst
20 Investments, LP v. Bank of New York Mellon, 09 CIV. 1154 (PKC),
21 2009 WL 4906096, at *2 (S.D.N.Y. Dec. 14, 2009) (quoting Hooper, 74
22 N.Y.2d at 492) (internal quotation marks omitted).

23 Under New York law, nothing in the Agreement or in the
24 Indemnification Agreement provides JMP with a contractual right to
25 indemnification for attorney fees incurred in the instant
26 litigation. Accordingly, Altair's Second Motion for Judgment on

27 _____
28 because the Court must strictly construe the Indemnification
Agreement "to avoid reading into it a duty which the parties did
not intend to be assumed." Hooper, 74 N.Y.2d at 491.

the Pleadings is GRANTED with respect to JMP's attorney fee claim. That claim is DISMISSED WITH PREJUDICE.

3. Promissory Estoppel

The Court now turns to JMP's extra-contractual claims, and hence to California law, beginning with JMP's claim for promissory estoppel.

Promissory estoppel requires: (1) a promise that is clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his or her reliance. The purpose of this doctrine is to make a promise that lacks consideration (in the usual sense of something bargained for and given in exchange) binding under certain circumstances.

Boon Rawd Trading Int'l Co., Ltd. v. Paleewong Trading Co., Inc., 688 F. Supp. 2d 940, 953 (N.D. Cal. 2010) (citations omitted).

Under this standard, JMP's claim for promissory estoppel must fail because no party disputes that the promises at issue here were supported by consideration. Indeed, JMP's breach of contract claim is based in large part on Altair's failure to pay the contractually required consideration. See Compl. ¶¶ 40-43. Under California law, the same allegations that give rise to a breach of contract claim cannot also "give rise to a claim for promissory estoppel, as the former [is] predicated on a promise involving bargained-for consideration, while the latter is predicated on a promise predicated on reliance in lieu of such consideration." Co-Investor, AG v. FonJax, Inc., C 08-01812 SBA, 2008 WL 4344581, at *3 (N.D. Cal. Sept. 22, 2008).

Here, JMP argues that the allegations giving rise to its promissory estoppel claim are different from those supporting its claim for breach of contract. 1st Opp'n at 16. JMP points to the

1 allegations that it (1) prepared a Fairness Opinion for Altair and
2 (2) acted as a placement agent in a small securities offering by
3 Altair, one much smaller than JMP would usually undertake. Id.;
4 Compl. ¶¶ 27, 49, 54; see also Compl. Ex. B-3 at 81-86 ("Fairness
5 Op."). Beginning with the Fairness Opinion, JMP concedes that the
6 Agreement called for JMP to prepare a Fairness Opinion for Altair.
7 1st Opp'n at 16 n.10 (citing Agr. at 1). But JMP states that the
8 Agreement called for JMP to provide a Fairness Opinion only if
9 Altair undertook a sale or merger -- not if Altair undertook a
10 strategic investment, as JMP says it did. Id. at 16. Altair
11 responds that, because the transaction was in fact a sale or merger
12 under the Agreement, JMP did nothing more than perform its duties
13 under the Agreement in rendering the Fairness Opinion. 1st Reply
14 at 10.

15 This dispute demonstrates why JMP's claim for promissory
16 estoppel is barred by its breach of contract claim: The only thing
17 at issue here is under which provision of the contract JMP will be
18 paid for its services, not whether there was a contract for
19 services at all or whether the promises contained in the contract
20 were supported by consideration. Whether the transaction was a
21 strategic investment, as JMP contends, or a sale or merger, as
22 Altair contends, JMP promised to provide financial services for a
23 percentage-based fee. See Agr. at 1. A careful reading of the
24 Agreement shows that the parties purposely left the definition of
25 which services JMP would provide open-ended. Id. The Agreement
26 provides: "You [Altair] have engaged us [JMP] to advise you
27 concerning opportunities for maximizing shareholder value, and we
28 will render to you such services as we mutually agree are necessary

1 or appropriate in connection with these opportunities." Agr. at 1.
2 The Agreement then gives examples of some of the services JMP may
3 agree to be "necessary or appropriate"; the list ends with the
4 example of JMP "advis[ing]" Altair "on matters related to
5 investments or acquisitions." Id. Whether the Fairness Opinion
6 pertained to a sale, merger, or strategic investment, there can be
7 no serious doubt that JMP rendered it pursuant to the Agreement, in
8 consideration for Altair's promise to pay under the Agreement. The
9 same reasoning applies to JMP's agreement to provide placement-
10 agent services: There is no allegation that this service was not
11 "mutually agree[d]" to be "necessary or appropriate in connection
12 with" JMP's engagement by Altair. Serving as a placement agent for
13 a small securities offering, as a client perquisite or otherwise,
14 falls squarely within the Agreement's expansive definition of JMP's
15 bargained-for performance.

16 Both of the detrimental acts alleged by JMP, then, were JMP's
17 required performance under the contract. No party disputes that
18 JMP's promise to perform under the contract is supported by
19 consideration. The only question is how much consideration. The
20 purpose of the doctrine of promissory estoppel is to permit a court
21 of equity to excuse the absence of consideration for an otherwise
22 enforceable promise. See Youngman v. Nevada Irr. Dist., 70 Cal. 2d
23 240, 249 (1969) (doctrine of promissory estoppel appropriate "if
24 injustice can be avoided only by its enforcement"). The doctrine
25 of promissory estoppel simply does not apply to the circumstances
26 of this case. Id. ("If the promisee's performance was requested at
27 the time the promisor made his promise and that performance was
28 bargained for, the doctrine is inapplicable.").

Altair raises several other grounds for dismissing JMP's promissory estoppel claim, but the Court need not reach them. The Court GRANTS Altair's motion with respect to JMP's promissory estoppel claim. Accordingly, that claim is DISMISSED WITH PREJUDICE.

4. Fraud and Negligent Misrepresentation

In addition to its two claims sounding in contract, JMP brings two claims sounding in tort: fraud and negligent misrepresentation. Under California law, these torts have essentially the same elements, except for the tortfeasor's requisite state of mind: The former requires scienter while the latter requires only negligence.⁹ Not surprisingly, the allegations underlying JMP's two tort claims are substantially identical except for the state-of-mind allegations. Compare Compl. ¶ 56 (alleging scienter) with id. ¶ 61 (alleging negligence). As explained below, both tort claims are barred for the same reason, independent of any state-of-mind allegations.

To summarize, JMP alleges that Altair misrepresented to JMP on numerous occasions that Altair would pay JMP the higher fee associated with a strategic investment when all along Altair knew that it would not. Compl. ¶¶ 25-26, 51-64. JMP says it rendered particular services in reliance on these alleged falsehoods, namely, the Fairness Opinion and placement-agent services discussed in the previous section. Id. ¶ 54.

⁹ In addition to the requisite state of mind, both require misrepresentation, justifiable reliance, and damages. Compare Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 990 (2004) (fraud) with Glenn K. Jackson Inc. v. Roe, 273 F.3d 1192, 1201 n.2 (9th Cir. 2001) (negligent misrepresentation).

Altair says that it is entitled to judgment on the pleadings with respect to JMP's tort claims because both claims are barred by California's economic loss rule.¹⁰ The Court agrees. The economic loss rule, in summary, "is that no tort cause of action will lie where the breach of duty is nothing more than a violation of a promise which undermines the expectations of the parties to an agreement." Oracle USA, Inc. v. XL Global Services, Inc., C 09-00537 MHP, 2009 WL 2084154, at *4 (N.D. Cal. July 13, 2009). This rule serves to prevent every breach of a contract from giving rise to tort liability and the threat of punitive damages: "Quite simply, the economic loss rule prevents the law of contract and the law of tort from dissolving one into the other." Robinson Helicopter, 34 Cal. 4th at 988 (internal quotation marks and brackets omitted).

While the economic loss rule is simple to grasp in the abstract, particular applications sometimes can be "conceptually difficult." United, 660 F. Supp. 2d at 1180; see also Erlich v. Menezes, 21 Cal. 4th 543, 551-52 (1999) (listing multiple exceptions to rule). This case, however, presents a direct application of the rule. Put simply, JMP has taken the allegations underpinning a straightforward claim for breach of a commercial contract and recast them as torts. The tort claims consist of nothing more than Altair's alleged failure to make good on its

¹⁰ Altair also challenges JMP's tort claims as insufficiently pled under Rule 9(b)'s heightened pleading standard for fraud. That standard obviously applies to JMP's fraud claim, and also applies to its negligent misrepresentation claim. United Guar. Mortg. Indem. Co. v. Countrywide Fin. Corp., ("United") 660 F. Supp. 2d 1163, 1179 (C.D. Cal. 2009). Because the Court disposes of the claims on other grounds, the Court need not consider this challenge and assumes that the tort claims are sufficiently pled.

1 contractual promises. In pleading the reliance element shared by
2 both torts, JMP points to its having rendered the Fairness Opinion
3 and served as Altair's placement agent. But, as explained above,
4 these acts constitute nothing more than JMP's usual performance
5 under the Agreement. As JMP concedes in its Complaint, the parties
6 "contemplate[d] a broad range of possible services that may be
7 provided by JMP," the range being limited only by the parties'
8 mutual agreement. Compl. ¶ 11.

9 JMP argues that Robinson Helicopter removes its tort claims
10 from the scope of the economic loss rule. The Court disagrees.
11 First, this Court, like others in California, doubts that Robinson
12 Helicopter has any application outside the products liability
13 context in which it was decided. United, 660 F. Supp. 2d at 1183;
14 Oracle USA, 2009 WL 2084154, at *6. On the contrary, the economic
15 loss rule seems particularly suited to commercial transactions.
16 Cf. Robinson Helicopter, 34 Cal. 4th at 988 (rule "hinges on a
17 distinction drawn between transactions involving the sale of goods
18 for commercial purposes where economic expectations are protected
19 by commercial and contract law, and those involving the sale of
20 defective products to individual consumers who are injured in a
21 manner which has traditionally been remedied by resort to the law
22 of torts"); United, 660 F. Supp. 2d at 1180 ("[T]he rule is
23 particularly strong when a party alleges 'commercial activities
24 that negligently or inadvertently went awry.'" (quoting Robinson
25 Helicopter, 34 Cal. 4th at 991 n.7)).

26 Second, the Robinson Helicopter court expressly described its
27 holding as being "limited to a defendant's affirmative
28 misrepresentations on which a plaintiff relies and which expose a

1 plaintiff to liability for personal damages independent of the
2 plaintiff's economic loss." 34 Cal. 4th at 993 (emphasis added).
3 JMP offers no allegations that it has been exposed to liability for
4 "personal damages," nor could it in the context of this commercial
5 transaction for financial advisory services. Therefore, this case
6 falls outside the ambit of Robinson Helicopter. See Oracle USA,
7 2009 WL 2084154, at *6 ("The only harm to [plaintiff] was its
8 failure to receive payment; therefore, there is no physical injury
9 or possibility of physical injury resulting from [defendant's]
10 conduct. Nothing that [defendant] has allegedly done has exposed
11 [plaintiff] to liability to any third party for personal damages or
12 any other type of loss. The exposure to liability for personal
13 damages was key to Robinson Helicopter's holding that the economic
14 loss rule did not bar tort remedies in that case."). JMP has
15 simply failed to allege any conduct "which is independent from the
16 various promises made by the parties in the course of their
17 contractual relationship." Id. at *4.

18 Lastly, policy considerations do not favor excusing JMP from
19 the economic loss rule. The rule generally means that courts
20 "enforce the breach of a contractual promise through contract law,
21 except when the actions that constitute the breach violate a social
22 policy that merits the imposition of tort remedies." Robinson
23 Helicopter, 34 Cal. 4th at 991-92 (internal brackets omitted).
24 "[C]ourts should be careful to apply tort remedies only when the
25 conduct in question is so clear in its deviation from socially
26 useful business practices that the effect of enforcing such tort
27 duties will be to aid rather than discourage commerce." Id. at 992
28 (internal brackets, ellipses, and quotation marks omitted). Here,

1 Altair's alleged conduct is not so clearly deviant as to warrant
2 the imposition of tort remedies. The dispute between Altair and
3 JMP comes down to a dispute over whether JMP will be paid a 1.5
4 percent commission or a 4 percent commission; JMP's assertions of
5 tortious conduct come down essentially to a claim that Altair not
6 only broke its promises, but did so in bad faith. A tort cause of
7 action will not lie on those facts. Foster Poultry Farms v. Alkar-
8 Rapidpak-MP Equip., Inc., --- F. Supp. 2d ---, 1:11-CV-00030 AWI,
9 2012 WL 1207152, at *7 (E.D. Cal. Apr. 11, 2012). This is because
10 the fraudulent misrepresentations alleged by JMP are "also alleged
11 to be a stand-alone contract." Id. Such claims must be barred by
12 the economic loss doctrine to preserve the policies underlying
13 contract law from being overwhelmed by those underlying tort law.
14 Id. "Virtually any time a contract has been breached, the party
15 bringing suit can allege that the breaching party never intended to
16 meet its obligations. To allow fraud claims in actions such as
17 this one would collapse the carefully-guarded distinction between
18 contract and tort law." Id. (quoting Oracle, 2009 WL 2084154, at
19 *7) (ellipses and brackets omitted).

20 The Court perceives no way that JMP could save its fraud or
21 negligent misrepresentation claims by amending its pleading.
22 However they are framed, they come within the scope of the economic
23 loss rule. Accordingly, the Court GRANTS Altair's Second Motion
24 with respect to JMP's claims for fraud and negligent
25 misrepresentation. Those claims are DISMISSED WITH PREJUDICE.

26 ///

27 ///

28 ///

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court GRANTS Altair's Second
3 Motion for Judgment on the Pleadings. The Court DISMISSES WITH
4 PREJUDICE JMP's breach of contract claim insofar as it is premised
5 on a contractual right for attorney fees arising from the Agreement
6 or the incorporated Indemnification Agreement. The Court also
7 DISMISSES WITH PREJUDICE JMP's promissory estoppel, fraud, and
8 negligent misrepresentation claims. As set forth in the Court's
9 March 14, 2011 Order, JMP's breach of contract claim for fees
10 provided by the Agreement remains undisturbed.

11 JMP's prayer for punitive damages was based solely on its
12 fraud and negligent misrepresentation claims. Compl. at 11.
13 Because those claims have been dismissed, the Court STRIKES JMP's
14 prayer for punitive damages.

15 The Court previously vacated the case management conference
16 set for June 8, 2012. ECF No. 49. Having reviewed the parties'
17 joint case management statement, ECF No. 48 ("CMS"), the Court
18 determines that no case management conference is needed at this
19 time. The Court APPROVES the schedule proposed by the parties, as
20 modified herein. CMS ¶ 17. Trial in this matter is set for
21 January 25, 2013. The pretrial conference is set for January 18,
22 2013. The last day for hearing dispositive motions is December 21,
23 2012. The discovery cutoff in this matter is September 28, 2012.

24
25 IT IS SO ORDERED.

26
27 Dated: July 23, 2012

28 
UNITED STATES DISTRICT JUDGE